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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
6 RENO, NEVADA

7 UNITED STATES OF AMERICA,) 3:94-cr-00044-ECR-RAM
8)
9 Plaintiff,) Order
10 vs.)
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12 DONALD LEROY HOGAN,)
13 Defendant.)
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14 Defendant has filed a Motion for Modification and Reduction of
15 Sentence (#1305) pursuant to Amendment 591 to the United States
16 Sentencing Guidelines ("U.S.S.G.") and 18 U.S.C. § 3582(c)(2). The
17 Government filed an Opposition (#1307)¹ on May 9, 2012. On May 21,
18 2012, Defendant filed a second Motion (#1308) requesting the Court to
19 hold an evidentiary hearing or enter a judgment showing that the
20 Government conceded that Defendant is entitled to a sentence reduction
21 pursuant to Amendment 591. The second Motion (#1308) seems to also
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24 ¹ On May 8, 2012, the Court ordered (#1306) the Government to
25 respond to Defendant's Motion for Modification and Reduction of
26 Sentence (#1305). The Government's Opposition (#1307), however, is
27 completely unresponsive to Defendant's Motion (#1305) because it
28 addresses an argument for a sentence reduction pursuant to Amendment
750 to the U.S.S.G., and does not address Defendant's argument for a
reduction pursuant to Amendment 591. However, because we find that
Amendment 591 does not entitle Defendant to a sentence reduction, we
deny Defendant's second Motion (#1308) for an evidentiary hearing or
an order regarding the Government's lack of response.

1 constitute Defendant's Reply in support of his original Motion
2 (#1305). Because Defendant is not eligible for a reduction of his
3 prison sentence, Defendant's Motions (##1305, 1308) will be denied.

4 Defendant was sentenced in 1996 to a term of 360 months to life
5 on Count One of the Indictment. The sentence on Count One was imposed
6 using a base offense level of 38 under § 2D1.1 of the then-mandatory
7 guidelines, a total offense level of 42, and criminal history Category
8 III, which called for a sentencing range of 360 months to life. The
9 version of § 2D1.1 in effect at the time of sentencing called for a
10 base offense level of 38 for an offense involving 1.5 kilograms or
11 more of cocaine base (crack cocaine). Based on the Pre-Sentence
12 Report, the Court found that the grand total of crack cocaine relevant
13 to Defendant's sentencing was "twenty-two kilograms." (Sentencing Tr.
14 9/16/1996 (#850) at 19). The Court of Appeals upheld the Court's
15 method of approximating the relevant quantity of drugs at sentencing.
16 United States v. Jackson, et al., 141 F.3d 1181 (Table), 1998 WL
17 141734, at *3 (D. Nev. Mar. 30, 1998).

18 Defendant contends that Amendment 591 to the United States
19 Sentencing Guidelines, clarifying the application of U.S.S.G. § 2D1.2,
20 authorizes the Court to resentence him. However, the record reflects
21 that Defendant's base offense level was calculated under §
22 2D1.1(c)(1), rather than § 2D1.2; therefore Amendment 591 does not
23 apply to him. Accordingly, Defendant cannot demonstrate that his
24 sentence is based on a sentencing range that has subsequently been
25 lowered by the Sentencing Commission, as required by 18 U.S.C. §
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1 3582(c)(2). See United States v. Leniear, 574 F.3d 668, 673 (9th Cir.
2 2009).

3 Defendant also contends that he is entitled to relief under
4 Amendment 591 because the drug quantity used to calculate his base
5 offense level was determined by the sentencing court, rather than a
6 jury. This argument is foreclosed. See Dillon v. United States, ---
7 U.S. ---, 130 S.Ct. 2683, 2692, 117 L.Ed.2d 271 (2010) (proceedings
8 under § 3582(c)(2) do not implicated the Sixth Amendment right to have
9 essential facts found by a jury beyond a reasonable doubt).

10 Finally, we note that Defendant's argument based on Apprendi v.
11 New Jersey, 530 U.S. 466 (2000) is without merit. It is well-settled
12 that Apprendi and its progeny do not apply retroactively to cases on
13 collateral review that, like Defendant's, were final before the
14 Apprendi decision was announced. See Schriro v. Summerlin, 542 U.S.
15 348, 358 (2004); Cooper-Smith v. Palmateer, 397 F.3d 1236, 1246 (9th
16 Cir. 2005) (citing United States v. Sanchez-Cervantes, 282 F.3d 664,
17 673 (9th Cir. 2002)).

18 For the foregoing reasons, Defendant's Motion for Modification
19 and Reduction of Sentence (#1305) must denied. Furthermore, because
20 we decide the issue as a matter of law, an evidentiary hearing is
21 unnecessary and Defendant's second Motion (#1308) will also be denied.

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23 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendant's Motion for
24 Modification and Reduction of Sentence (#1305) is **DENIED**.

25 **IT IS FURTHER ORDERED THAT** Defendant's Motion Requesting an Order
26 (#1308) is **DENIED**.

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1 The Court will also execute the separate form order AO 247 to
2 further reflect this Order; the form order AO 247 shall be separately
3 filed by the Clerk.

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5 DATED: May 24, 2012.

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7 UNITED STATES DISTRICT JUDGE